No. 11900

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MARCELLUS B. HAYES AND MARY L. HAYES, ALSO KNOWN AS BELL HAYES, HUSBAND AND WIFE; ADELBERT M. HAYES; AND HARNEY COUNTY, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLEES

AND

MARCELLUS B. HAYES AND MARY L. HAYES, ALSO KNOWN AS BELL HAYES, HUSBAND AND WIFE; AND ADELBERT M. HAYES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY AND ANSWER BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES, APPELLANT

ARGUMENT

I

The District Court lacked power to strike the declaration of taking

Since appellees concur in this view (Br. 17–19) there is no need for further comment on this proposition.

took it page by page (R. 144). Mr. Hayes admitted that he read it (R. 118); and Mrs. Hayes thought he had done so (R. 104). Before it was signed several hours were spent in discussion of its terms (R. 144).

Appellees do not assert—much less show—that they were hurt by failure to have their counsel on hand. However, even if they had been hurt, there would be no warrant for making the Government responsible. Appellees were aware of the possible utility of their lawyers: they had consulted them once and disregarded their advice. If they felt the need of further consultation, they could have had it. Moreover, if the lawyers had thought they might be needed, there was nothing to prevent Mr. McCulloch from so suggesting in his letter to Mr. Hayes. (Since he made no such suggestion, it must be assumed he was satisfied of appellees' capacity.) With appellees and their lawyers of the opinion that legal assistance would not be helpful, it would have been highly presumptous for the Government representatives to insist that the lawyers be present. A man's lawyer is not his keeper.

Of a piece with the foregoing are suggestions (Br. 4, 32) that the Government hurried appellees into the contract. On the contrary, Mrs. Hayes testified there were three or four talks with Mr. Schaar (R. 97). And Mr. Hayes testified that Mr. Schaar visited the Hayes house "at different times" (R. 116). As already pointed out, execution of the contract was delayed until Mr. Hayes consulted the lawyers (R. 137, 140). When Mr. Schaar took the document to the Hayeses, he spent several hours discussing it with them before they signed (R. 144). Later, Mr. Wood-

ward had some doubt about the wording of the provision about the five years' free use. He reworded it and had Schaar take the revision to them for intialing (R. 138).

It is therefore manifest that in making the contract the Hayeses were not handicapped by incapacity, need of money, want of legal advice or pressure to act without necessary deliberation. Consequently their objections to the contract must depend solely on intrinsic worth. They dealt with the Government representatives as equals and at arm's length.

A. *Appellees' incorrect impression that the Government could not abandon a condemnation proceeding is immaterial.*—Appellees' assertion (Br. 20–25) that they would not have made the contract if they had known that the Government was not then bound to take the land furnishes no ground for setting aside the contract. It only means that, although they would not have contracted when only a condemnation petition was pending, they would have done so if a declaration of taking had been filed. Since that declaration was subsequently filed, the contract would have been executed in any event.[2] Moreover, the assertion is hardly credible. More probably appellees made the contract in order to avoid the expenses of litigation. Certainly, the avoidance of these expenses was much on their minds (R. 103, 110–111, 119, 122).

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[2] Of course, if the contract had not been made, the Government might not have filed a declaration of taking; it might have been deterred by fear it would be compelled to pay an excessive award. But certainly it would have filed a declaration of taking had it known that—as appellees testified—they would agree on a price once their property was *taken*.

They could be avoided only if the issue to be litigated was settled by agreement. Otherwise, even if the Government after trial abandoned the proceedings because of an excessive award, the trial—and the consequent expense to appellees—was bound to occur.

B. *The parties did not intend that appellees should have an option to lease the lands.*—Appellees next assert (Br. 25–28) that the contract did not set forth *their* understanding that after the five-year use ended they would have an option to lease the lands. Even if this assertion were supported by the record, it would not invalidate the contract. The contract is good if it embodies the agreement of the parties; in other words, it is enforceable except in the case of mutual mistake. *Philippine Sugar &c. Co.* v. *Phil. Islands,* 247 U. S. 385, 389 (1918) and cases cited; *Staten Island Hygeia Ice & Cold S. Co.* v. *United States,* 85 F. 2d 68, 71 (C. C. A. 2, 1936); *Clarksburg Trust Co.* v. *Commercial Casualty Ins. Co.,* 40 F. 2d 626, 630 (C. C. A. 4, 1930). Appellees do not assert the existence of mutual mistake.

Furthermore, the appellees themselves did not make a mistake. The record shows:

The pertinent provision of the contract plainly excludes any option to lease. It makes the fee simple title "Subject to the reservation of the right to use in livestock ranching operations * * * the surveyed land and Special Master Tract 48 in the bed of Malheur Lake for a period of five (5) years from the date hereof in accordance with rules and regulations of the Secretary of the Interior" (R. 48). Anyone who can read can understand that the provision deals with a five-year period and no more.

The provision was carefully drawn and specially called to the attention of appellees. It will be noted (R. 48) that it is initialed by each of the Hayeses. The reason for this is found in the testimony of Mr. Woodward, one of the Government's representatives. He testified (R. 138) that he "was not satisfied with the precise wording of the reservation of the five-years use. I felt it might lead eventually to difficulties from misunderstandings,—while the Hayeses and ourselves and Mr. Schaar understood each other, we couldn't be sure that everybody would be around five years,—so it was reworded and the original agreement was sent back to Mr. Schaar and he was requested to contact the Hayeses and get them to initial the revised pages, which he did."

It is clear that Mrs. Hayes understood the scope of the provision (R. 96). At one point at least, Mr. Hayes showed the same understanding (R. 128). The only basis for the view that he had a larger idea would have to rest upon the following excerpt from his direct examination (R. 119–120):

> Q. Well, didn't you understand, or do you understand, that you still, if you want to avoid going through court, can take the money and let the Government have the land at the price stated in the agreement?
>
> A. Well, it was a little more than sixteen thousand, they give us a five-year lease free,—that is embodied in the contract—and an option on the land if we wanted it. Of course, we would have to pay rental after five years, but the first five years we have the same privilege and the same rights we enjoy there at the

present time and the sixteen thousand, with an option on using this land as long as we wanted it.

Q. What I am getting at, Mr. Hayes, it is this, if I follow you correctly, you suggested you were willing to take the sixteen thousand and the five years' use to avoid going through court under those circumstances?

A. Yes sir.

Thus, the handle for this particular attack on the contract is found in an irresponsive answer to a question directed to quite another matter. This answer so little impressed the Hayeses' counsel that in his next question he persisted in his prior interpretation of the contract. Nor did he later attempt to draw a more expansive construction from Mr. Hayes or from Government witnesses. It is not surprising therefore that, as appellees observe (Br. 26) Mr. Hayes' outburst "was not denied by Government witnesses."

Appellees were not mistaken on this provision of the contract.

C. *The contract provision settling other claims against the Government was valid.*—Finally, appellees assert (Br. 28–32) that they were not told the contract would include a settlement of claims they had made against the Government for prior occupation of the land and contend that therefore the contract was invalidated.

On the question of fact the record shows the following:

At the trial appellees testified the damage claim was not mentioned in the negotiations (R. 104, 105–

106, 118). On the other hand, Mr. Woodward testified he brought it up at the meeting at which it was determined the Hayeses would consult their attorneys. He said that "shortly before I left the house I indicated to them that we would like in that settlement to include the claims under the Tucker Act so that we could clear up all phases of our troubles on Malheur Lake and square the thing away, and they indicated that was satisfactory, that when they were through with it they were through with it" (R. 137–138; see also R. 142).

Of course, the provision was in the contract when it was signed by appellees. Mrs. Hayes, however, said she didn't know it was there (R. 105–106). Mr. Hayes testified he didn't remember it (R. 118). The trial judge did not resolve the doubts engendered by these contradictions. Thus, although the foregoing testimony was given at the preliminary hearing on the contract, the judge did not at that time make any finding of fact. His sole reference to the matter occurred in the course of his remarks (R. 341–348) after the trial and prior to dismissing the proceedings. He said then (R. 343): "Besides that, I don't think that [appellees] knew that they were compromising the damage claim they had against the Government." Even if deemed to be a finding, this remark does not reject Mr. Woodward's testimony. For aught that appears, the judge merely believed that the Hayeses were as heedless of what they heard as of what they signed. Accordingly, it may not be assumed that they were not told that—with their permission—the provision would be included.

But even if they were not so informed, the contract would not be invalidated. The provision *was* in the contract. Appellees could read and, if they did not understand, they could ask. They do not say the provision was concealed from them or erroneously interpreted. They say only that they were not told in advance that it would be in the contract. In an effort to show that the transmittal of such information to them was essential to a valid contract, they refer (Br. 29) to their ages and to the absence of their attorneys. The irrelevance of these considerations has already been pointed out (pp. 2, 3–4, *supra*). The fact is that they were capable of contracting. This being so, they were responsible for their acts and failures to act. Of course, the Government representatives were obliged to be honest. There is no suggestion they were not. But they were under no duty to represent appellees and of course did not purport to. Appellees understood this. True, they quote (Br. 29–30) Mrs. Hayes' statement (R. 104): "I simply trusted to what Mr. Schaar said * * *." Standing alone, this would convey the idea that appellees depended on the Government representatives to protect their interests. But Mrs. Hayes was not finished. She went on: "and I think Mr. Hayes read [the contract]. I thought he did anyway." Plainly, therefore, appellees' misunderstanding of this provision of the contract—if there was a misunderstanding—was not attributable to the Government and furnishes no ground for setting aside the contract.

ANSWER BRIEF FOR THE UNITED STATES, APPELLEE

QUESTION PRESENTED

Whether the action of the trial court setting aside the verdict and the judgment entered upon it constituted reversible error.

ARGUMENT

I

THE TRIAL COURT RIGHTLY SET ASIDE THE VERDICT

The jury found that the value of the fee to the condemned lands, subject to the reservation by the owners of free use for five years, was $36,500 (R. 55–56). The Government moved to set aside the award and the judgment entered on it (R. 56–59) on the ground it was excessive (R. 59). The trial court granted the motion (R. 60–61). In this respect it did not err. The record shows:

Taking into account the use reserved by the owners, Government witnesses appraised the property at $9,922 (R. 311) and $10,800 (R. 291). Overlooking the fact of this reservation (R. 261, 262) the owners' witnesses valued the property at $23,885.40 (R. 259) and $40,245 (R. 242). Thus, the rejected award of $36,500 was more than 300 per cent of the testimony of the Government, 225 per cent of the price fixed by the owners in the disputed contract and—if appraisals neglecting essential elements of value are entitled to credit[3]—more than 50 per cent above one of the

[3] The Government's motion to strike the testimony (R. 262–263) was overruled (R. 263).

owners' witnesses but less than 10% below the nearly double figure of the other.

In the light of the foregoing, the Government deems it unnecessary to answer in detail the owners' contention (Br. 43–51) that even if the verdict was excessive it was not outrageous and in setting it aside the district judge abused discretion.

In conclusion—in consideration of a direction from this Court to the trial court to reinstate the verdict and shut off a new trial—the owners' offer to accept a remittitur of whatever amount this Court might determine should be cut from the $36,500 (Br. 51–53). Assuming the ability of appellate courts so to act, it is plain that in this case the Court lacks information necessary to compute a remittitur. Whatever reduction it might order would be pure guess. In *United States* v. *Certain Parcels of Land, Etc.,* 149 F. 2d 81, 83 (C. C. A. 5, 1945), invoked by the owners, the court similarly unable to evaluate the testimony thought that the Government's estimate of just compensation provided a measure for the remittitur and so reduced the judgment to that figure. If this Court should take the same view of the estimate, it would order a remittitur of $20,500 because the estimated compensation here is $16,000, the contract price. It is to be doubted that such action would be acceptable to the owners.

CONCLUSION

It is submitted that for the reasons stated by the Government in its opening brief the order of the district court should be reversed and the cause remanded with directions to reinstate the dismissed proceedings and to enter judgment for defendants for the amount stipulated in the contract.

Respectfully,

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DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948